IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

CRL.A.No. 1157 of 2002()

SC.658/1999 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE (ADHOC) II, KASARAGOD.

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APPELLANT: ACCUSED:

B. DAMODARAN, S/O. CHANDU,
AMMENKODE, BOVIKKANAM, MULIYAR VILLAGE.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE:

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1. STATION HOUSE OFFICER,
ADHUR POLICE STATION.

2. STATE OF KERALA REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20/08/2007, THE COURT ON 20/08/2007 DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1157 of 2002

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Dated this the 20th day of August, 2007

JUDMENT

Appellant, accused in S.C.No.658/99 on the file of the Court of the Additional Sessions Judge (Adhoc) II, Kasaragod, was found guilty under section 55(a) of the Abkari Act. The allegation against the appellant was that he was found in possession of 220 packets each containing 100 ml. Karnataka Made Arrack. On the side of the prosecution, PW1 to PW4 were examined and Exts.P1 to P7 and MOI to MOIII were marked. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the allegation and stated that he was innocent and he was arrested from his house. Relying on the evidence adduced by the prosecution, the trial court found the appellant guilty under section 55(a) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for six months. The above conviction and sentence awarded against the appellant are assailed in this appeal.

2. This Court heard learned counsel for the appellant and the learned Public Prosecutor.

3. The learned counsel for the appellant has contended that the trial court has committed serious error in accepting the evidence of PWs.1, 3 and 4, official witnesses, whereas the only independent witness who was examined as PW2 turned hostile to the prosecution. The learned counsel has also contended that while detecting the offence PW4, the Sub Inspector of Police, had violated the provisions of the Abkari Act as well as the Kerala Excise Manual. The learned counsel further contended that the prosecution evidence ought not have been accepted by the trial court as there was delay in producing the sample and residue before the court.

4. Before considering the contentions raised in the appeal, it is only proper for this Court to consider the entire prosecution evidence adduced by PWs.1, 3 and 4.

5. PW4 detecting officer stated that on 15-2-1998 he was on patrol duty, he got information that the appellant was engaging in the sale of arrack in the Bovikanam hills. Then he along with PWs.1 and 3 proceeded to the spot and they found the appellant sitting under a cashew nut tree and MO1 plastic sack near him. He also stated that on seeing them, the appellant attempted to ran away. They restrained the appellant and inspected

the plastic sack. They found 220 packets each containing 100 ml. arrack. He also stated that after preparing mahazar, the arrack packets were seized. He further stated that the seized articles and the appellant were brought to the police station and Ext.P4 FIR was registered. As per Ext.P7 chemical analysis report, the samples contained 28.41% of ethyle alcohol by volume. The evidence of PW4 is corroborated by the evidence of PWs.1 and 3 who accompanied PW4 at the time of detection of the crime.

6. Evidence of PW2, the only independent witness, would show that he had not seen anything recovered from the appellant and he was not present at the spot when the alleged recovery was made. In this context, the evidence of PW3 would show that no independent witness was available at the spot when the alleged recovery was made. In the above circumstances, the evidence of PWs.1, 3 and 4 requires corroboration by independent evidence. There is no statement that the sample was taken and sealed in the presence of independent witness.

7. On a perusal of Ext.P2 would show that when PW4 and party came to the spot, the appellant was standing under the cashew nut tree and MO1 plastic sack near him. There is no evidence regarding the circumstances under which the alleged seizure was made or the presence of any independent witness. As per the provisions of the the Abkari Act and

Excise Manual, it is the duty of the detecting officer to call two or more independent witness to witness the incident. Such a procedure is not followed. If that be so, the evidence of PW4 regarding the seizure of MO1 cannot be accepted as he had violated the provisions contained in the Abkari Act and the Excise Manual. As per Ext.P5 thondi list, the contraband article was produced before the court on 27-5-1998. No proper explanation was given for the delay of about three months in producing the sample and residue before the court. Further either PW4 or PW1 had given no evidence regarding the keeping of the sample and residue in safe custody till the same was produced before the court. As per the principle laid down in Narayani V. Excise Inspector, (2002(3) KLT 725) in the absence of any evidence to prove that the sample and residue were kept in the proper custody till the the date of producing the same before the court, the chance of tempering cannot be ruled out. The specific case set up by the appellant is that he was arrested from his house and he was not aware of any seizure as alleged by the prosecution. In the above circumstances, this Court is of the view that the prosecution had not succeeded in proving the case against the appellant beyond reasonable doubt. Hence, the benefit of doubt is to be given to the appellant.

8. In the result, the judgment under appeal is set aside and the appellant is acquitted. Bail bond executed by the appellant shall stand cancelled.

The appeal is allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment

20-8-2007